

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL DAVID BANKS,

Defendant-Appellant.

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UNPUBLISHED

April 15, 2003

No. 238029

Muskegon Circuit Court

LC No. 00-045457-FC

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

MEMORANDUM.

Defendant appeals as of right from his conviction for domestic violence, MCL 750.812, and his enhanced sentence of four to fifteen years' imprisonment, which reflects defendant's status as an habitual offender, fourth offense, MCL 769.12. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The failure of the trial court to use the phrase "substantial and compelling" during its sentencing articulation, alone, is insufficient to establish that the court did not apply this standard. Absent clear evidence on the record that the court failed to employ the substantial and compelling standard, the presumption that the trial court knows the law must prevail. *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001). In the instant case, the prosecutor advised the court on the record that it could depart from the guidelines if substantial and compelling reasons to do so existed. Moreover, nothing in the record demonstrates that the court was operating under the mistaken belief that it was imposing sentence under the former judicial guidelines, particularly where the court scored the sentence information report under the legislative guidelines. Accordingly, the presumption prevails. *Id.*

Further, the court did not abuse its discretion when it concluded that substantial and compelling reasons existed on the record to justify the imposition of a sentence that departed upward from the guidelines recommendation. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). The trial court exceeded the guidelines in large part for the reason that they gave inadequate weight to the nature of the offense. Although we conclude that Offense Variable 12 was erroneously scored, MCL 777.42(1)(f); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), even taking into account this scoring error, the corrected offense variable total score is more than five times the point total needed to "max out" a G grid offense. This point total, which is supported by the information contained in the presentence investigation report, confirms the conclusion that the degree to which defendant terrorized his victim was

inadequately considered in the guidelines. MCL 769.34(3); *People v Babcock*, 250 Mich App 463, 466; 648 NW2d 221 (2002). This factor justifying departure is objective and verifiable. *Babcock*, 244 Mich App at 75.

The advice of rights given defendant by the trial court, both orally and in writing, does not comport word-for-word with the language used in MCL 769.34(7). Nevertheless, any error does not undermine the validity of defendant's sentence. Moreover, any error was harmless in light of the fact that defendant challenges his sentence on the ground that it "is longer or more severe than the appropriate sentence range." MCL 769.34(7).

Finally, defendant's claim that the trial court failed to complete a sentence information report departure evaluation is unsupported by the record.

Affirmed.

/s/ Kathleen Jansen  
/s/ Kirsten Frank Kelly  
/s/ Karen M. Fort Hood